Supreme Court, U.S.
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No. 01-374

In The

Supreme Court of the United States

JOHN S. GRIMES, JR.,

Petitioner,

v.

THE CITY OF ST. JOSEPH, MISSOURI; STERETT W. SCHANZE; HAROLD JOHNSON; TOM ROBILLARD; ALANE STUDLEY; and WALTER HUGHES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(As Stated by Petitioner)

1. Does the Fourth Amendment protection against unreasonable seizure provide the constitutional foundation for a claim of malicious prosecution under 42 U.S.C. § 1983, and, if so, what are the elements of such a claim and what constitutes a seizure?

2. Is due process violated when the City Manager who serves in the capacity of having final review or decisionmaking authority over termination of a public employee, is involved in making the initial termination and other disciplinary decisions, is involved in making decisions to initiate and maintain criminal prosecutions and a search, and is required by law to advise the City Council on approval of an arbitration decision which could follow the City Manager's decision?

3. When an illegal search is conducted to support criminal charges which can arise only because of the condition resulting from the existence of personal property on real property, can the search be challenged by the person who owns or controls the personal property located on the real property which the person also owns, controls or possesses?

4. Should a court consider evidence of very close temporal proximity between the exercise of a constitutionally protected right (in this case, the right to confront witnesses in a trial) in relation to the taking of an adverse employment action, and is such evidence sufficient evidence of causation to preclude summary judgment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

MISSTATEMENTS OF FACT IN QUESTIONS PRESENTED 1

SUMMARY OF REASONS FOR DENYING THE PETITION 3

STATEMENT OF THE CASE 6

STATEMENT OF FACTS 8

REASONS FOR DENYING THE WRIT 12

I. QUESTION PRESENTED NO. 1 DOES NOT PRESENT AN IMPORTANT UNRESOLVED ISSUE OF FEDERAL LAW ON THE EXISTENCE AND SCOPE OF A § 1983 CLAIM IN THE NATURE OF MALICIOUS PROSECUTION BECAUSE PETITIONER POINTS TO NO CONSTITUTIONAL VIOLATION THAT ACCOMPANIED THE PROSECUTIONS AND THE PROSECUTIONS WERE SUPPORTED BY PROBABLE CAUSE 12

A. The Summonses Issued Were Not "Seizures" or Without Probable Cause 15

B. Petitioner Cannot State a Claim in Any Additional Restrictions upon His Liberty .. 17

C. Petitioner Cannot Prove the Elements of State-Law Malicious Prosecution 18

D. Petitioner's Claim, If Any, Lies in the Due Process Clause 20

TABLE OF CONTENTS - Continued

Page

II. QUESTION PRESENTED NO. 2 DOES NOT PRESENT AN IMPORTANT UNRESOLVED ISSUE OF FEDERAL LAW ON DUE PROCESS ISSUES RAISED WHEN A FINAL DECISION-MAKER IS INVOLVED IN EARLIER ADVERSE EMPLOYMENT DECISIONS BECAUSE THE INVOLVEMENT OF THE DECISIONMAKER WHOSE DECISION PETITIONER CHALLENGES WAS LIMITED TO KEEPING APPRISED OF THE PROGRESS OF THE DISCIPLINARY PROBLEM CONSISTENT WITH HIS ROLE AS CITY MANAGER AND THE DECISION WAS NOT FINAL BUT SUBJECT TO AN ARBITRATION IN WHICH PETITIONER DECLINED TO PARTICIPATE..... 21

III. QUESTION PRESENTED NO. 3 DOES NOT PRESENT AN IMPORTANT UNRESOLVED ISSUE OF FEDERAL LAW ON THE FOURTH AMENDMENT LEGALITY OF A SEARCH ON PROPERTY PETITIONER OWNED OR ON WHICH HE STORED PERSONAL PROPERTY BECAUSE PETITIONER DID NOT OWN THE REAL PROPERTY SEARCHED AND, THUS, POSSESSES NO STANDING TO COMPLAIN OF A FOURTH AMENDMENT VIOLATION 23

IV. QUESTION PRESENTED NO. 4 DOES NOT PRESENT AN IMPORTANT UNRESOLVED ISSUE OF FEDERAL LAW ON RETALIATION FOR EXERCISE OF A RIGHT TO CONFRONT WITNESSES BECAUSE THE TOTALITY OF PETITIONER'S EVIDENCE CONSISTS OF MERE TEMPORAL PROXIMITY OF THE EVENTS, AND THE COURT HAS DECIDED THE LEGAL ISSUE, LEAVING THE FACTUAL ISSUE TO THE COURTS BELOW 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 266 (1994) ..... *passim*

Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) 12

Bell v. Runyon, 242 F.3d 373 (Table) (8th Cir. 2000) 26

Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996) 25

Britton v. Maloney, 196 F.3d 24 (1st Cir. 1999), *cert. denied*, 530 U.S. 1204 (2000) 16, 17

Brooks v. City of Winston-Salem, North Carolina, 85 F.3d 178 (4th Cir. 1996) 13

Brower v. County of Inyo, 489 U.S. 593, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) 16

Burnett v. Griffith, 769 S.W.2d 780 (Mo. banc 1989) 19

California v. Hodari D., 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991) 17

Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) 18

Cervantes v. Jones, 188 F.3d 805 (7th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000) 12

Clark County School Dist. v. Breeden, 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) 25, 26

Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) 5

Cook v. Sheldon, 41 F.3d 73 (2d Cir. 1994) 13

TABLE OF AUTHORITIES – Continued

Page

Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001) 13

Eugene v. Alief Indep. Sch. Dist., 65 F.3d 1299 (5th Cir. 1995), *cert. denied*, 517 U.S. 1191 (1996) 12

Evans v. Ball, 168 F.3d 856 (5th Cir. 1999) 14

Gallo v. City of Philadelphia, 161 F.3d 217 (3d Cir. 1998) 14, 16, 18

Haswell v. Liberty Mutual Ins. Co., 557 S.W.2d 628 (Mo. banc 1977) 19

Holley v. Caulfield, 49 S.W.3d 747 (Mo.App. E.D. 2001) 19

Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States, 510 U.S. 27, 114 S.Ct. 425, 126 L.Ed.2d 396 (1993) 6

Jacobs v. Bonser, 46 S.W.3d 41 (Mo.App. E.D. 2001) 19

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) 24

Kerr v. Lyford, 171 F.3d 330 (5th Cir. 1999) 12

Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993) 13

Lambert v. Williams, 223 F.3d 257 (4th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 889, 148 L.Ed.2d 797 (2001) 13

Lee v. Mihalich, 847 F.2d 66 (3d Cir. 1988) 13

Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986) 18

Murphy v. Lynn, 118 F.3d 938 (2d Cir. 1997), *cert. denied*, 523 U.S. 1115 (1998) 14

Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988) 23

TABLE OF AUTHORITIES – Continued

Page

Nesmith v. Taylor, 715 F.2d 194 (5th Cir. 1983) 15

Nieves v. McSweeney, 241 F.3d 46 (1st Cir. 2001) 13

Pace v. City of Des Moines, 201 F.3d 1050 (8th Cir. 1993) 13

Price v. Roark, 256 F.2d 364 (5th Cir. 2001) 13, 17

Reed v. City of Chicago, 77 F.3d 1049 (7th Cir. 1996) 13, 15

Riley v. Dorton, 115 F.3d 1159 (4th Cir. 1997), *cert. denied*, 522 U.S. 1030 (1997) 14, 21

Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249 (1st Cir. 1996) 13

Rohman v. New York City Transit Authority (NYCTA), 215 F.3d 208 (2d Cir. 2000) 14

Sheet Metal Workers' Intern. Ass'n v. Lynn, 488 U.S. 347, 109 S.Ct. 639, 102 L.Ed.2d 700 (1989) 25

Singer v. Fulton County Sheriff, 63 F.3d 110 (2d Cir. 1995), *cert. denied*, 517 U.S. 1189 (1996) 14, 15

Smith v. Maryland, 442 U.S. 735 (1979) 24

Sowell v. Alumina Ceramics, Inc., 251 F.3d 678 (8th Cir. 2001) 26

Sprenger v. Federal Home Loan Bank of Des Moines, 253 F.3d 1106 (8th Cir. 2001) 26

State ex rel. Police Retirement System of St. Louis v. Mummert, 875 S.W.2d 553 (Mo. banc 1994) 19

Strength v. Hubert, 854 F.2d 421 (11th Cir. 1988) 13

Taylor v. Meacham, 82 F.3d 1556 (10th Cir. 1996), *cert. denied*, 519 U.S. 871 (1996) 14, 15

TABLE OF AUTHORITIES – Continued

Page

Technical Ordnance, Inc. v. United States, 244 F.3d 641 (8th Cir. 2001) 13

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968) 16

Torres v. McLaughlin, 163 F.3d 169 (3d Cir. 1998), *cert. denied*, 528 U.S. 1079 (2000) 14, 20

Uboh v. Reno, 141 F.3d 1000 (11th Cir. 1998) 13

United States v. Dixon, 58 F.3d 1258 (8th Cir. 1995), *cert. denied*, 516 U.S. 1064 (1996) 24

United States v. Dunn, 480 U.S. 294 (1987) 24

United States v. McCaster, 193 F.3d 930 (8th Cir. 1999) 24

West v. Gibson, 527 U.S. 212, 119 S.Ct. 1906, 144 L.Ed.2d 196 (1999) 6

Whiting v. Traylor, 85 F.3d 581 (11th Cir. 1996)....13, 15

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 25

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. VI 26, 27

U.S. Const. amend XIV 4, 13, 15, 20

STATUTES

42 U.S.C. § 1983 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

RULES

S. Ct. R. 10 ..... 3, 4, 5

S. Ct. R. 14.1 6

S. Ct. R. 15.2 1

MISSTATEMENTS OF FACT IN QUESTIONS PRESENTED

Pursuant to S. Ct. R. 15.2, the City of St. Joseph, Missouri, and City officials Sterett W. Schanze, Harold Johnson, Tom Robillard, Alane Studley, and Walter Hughes, respondents, advise the Court of the following misstatements of fact in the Questions Presented.

Question Presented No. 1

This question presents no factual misstatements.

Question Presented No. 2

This question presents the following factual misstatements, correction of which alters the character of the Question:

a. Under City law, the City Manager did not possess final review or final decisionmaking authority over the termination of petitioner, John S. Grimes, a City employee. Rather, final decisionmaking authority lay in an arbitrator, an avenue of redress petitioner voluntarily chose not to pursue.

b. The City Manager did not make the initial termination decision or any other disciplinary decisions except an appealable decision to affirm a termination decision made by other City officials.

c. While the City Manager was in the ordinary course of business briefed on the progress of the proceedings and he stated he believed he might have spoken with other City officials regarding the disciplinary proceedings

and criminal prosecutions, petitioner presented no evidence to indicate the City Manager played an active or influential role in initiating or maintaining either.

d. The City Manager was not required by law to secure the approval of the City Council prior to effectuating an arbitration decision. The decision of the independent arbitrator was final. The City law to which petitioner refers required only that the City Council appropriate any funds awarded in arbitration. If the City failed to appropriate funds, presumably nothing in City law would preclude petitioner from pursuing an action at law.

Question Presented No. 3

This question presents several factual misstatements that alter the character of the Question. First, petitioner did not own the real property searched but, rather, relinquished all ownership rights by, in the throes of the investigation, deeding the property in fee to his mother. Further, the record reveals no evidence of control over, or a possessory interest in, the real property. While petitioner did own some personal property present on the real property, the personal property was not searched. Petitioner presented no factual evidence or legal argument to the courts below that, because of the presence of that personal property, he somehow possessed a Fourth Amendment privacy interest in the real property.

Question Presented No. 4

This question presents no factual misstatements.

SUMMARY OF REASONS FOR DENYING THE PETITION

The Court must deny the petition for writ of certiorari because this case presents no important unresolved issues of law. Clarification of the factual misstatements in the Questions Presented reveals only two Questions, the first and fourth, that even remotely raise issues satisfying the requisite of S. Ct. R. 10, and the Court resolved the fourth just last term. Further, the case presents, at most, only minute and intensive issues of fact not suited for resolution in this tribunal. Deciding this case would offer nothing but a constitutional jurisprudence of specific factual determinations and consequent micromanagment of the courts below, far afield from the Court's commission to pronounce broad legal principles instructive to the bar and citizenry. For these reasons, as more specifically outlined, *infra*, the Court must deny the petition.

Question Presented No. 1

The decision below does not conflict with any decision of this Court or with any decision of any Circuit Court of Appeals, S. Ct. R. 10(a), or raise an important question of law that has not been, but should be, settled by this Court. S. Ct. R. 10(c). While the issue of the viability of a § 1983 action in the nature of malicious prosecution may be an important undecided question on which the circuit courts of appeal conflict, this case is not the one in which to resolve the dispute and define any actionable right. The case presents summonses supported

by probable cause that do not constitute Fourth Amendment seizures or, if they do, that do not, as even petitioner concedes, violate the Amendment. The case further presents no evidence of restrictions on liberty that might constitute a "continuing seizure" and thereby bring it within the parameters of the Fourth Amendment. Additionally, the case presents no evidence of any impropriety in the prosecutions and insufficient evidence to satisfy the state-law elements of malicious prosecution. Finally, because petitioner does not under the facts raise even a potential Fourth Amendment violation, his claim, if any, even after *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 266 (1994), arises under the Due Process Clause of the Fourteenth Amendment, an avenue of redress he waived by failing to raise. In this context, the viability of a § 1983 claim does not present an important issue of federal law.

Question Presented No. 2

The decision below does not conflict with any decision of this Court or with any decision of any Circuit Court of Appeals, S. Ct. R. 10(a), or raise an important question of law that has not been, but should be, settled by this Court. S. Ct. R. 10(c). Clarification of the factual misstatements in the Question reveals petitioner does not present the issue of bias he urges this Court to address. The issue of meaningful opportunity to be heard in employment disciplinary proceedings in the context of involvement in the preliminary stages by the final decisionmaker is not presented because the challenged decisionmaker did not issue a final decision and his prior involvement, if any, was minimal. Respondents were cognizant of, and fully complied with, the strictures of the

governing law on procedural due process outlined in *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), and its progeny.

Question Presented No. 3

The decision below does not conflict with any decision of this Court or with any decision of any Circuit Court of Appeals, S. Ct. R. 10(a), or raise an important question of law that has not been, but should be, settled by this Court. S. Ct. R. 10(c). Clarification of the factual misstatements reveals petitioner had no cognizable Fourth Amendment interest or has not preserved the complaint for review. Petitioner presented no evidence of ownership or control of the real property searched or evidence that the presence on the real property of his personal property gave him an expectation of privacy that might be cognizable under the Fourth Amendment.

Question Presented No. 4

The decision below does not conflict with any decision of this Court or with any decision of any Circuit Court of Appeals, S. Ct. R. 10(a), or raise an important question of law that has not been, but should be, settled by this Court. S. Ct. R. 10(c). Petitioner presents evidence only of mere temporal proximity to support the causal element of his retaliation claim, and this Court held just last term that "very close" proximity was required, leaving to the lower courts the task of fleshing out this standard. Further, the district court found "absolutely no evidence" of retaliation, and the evidence reveals a cascade of progressively more onerous adverse employment actions and continued recalcitrance by the petitioner that

prefaced the adverse action of which petitioner complains. Thus, while petitioner presented evidence only of mere temporal proximity, respondents presented evidence of considerably more.

"*Third*: Summary Judgment Was Not Appropriate on Any of Grimes' Claims"

Petitioner attempts to state this additional point in his section purporting to state "Reasons for Granting the Writ." *See* Petition for Writ of Certiorari at 14. Petitioner does not present this complaint by a Question Presented and, accordingly, does not preserve it for review by the Court. S. Ct. R. 14.1(a).[1] Further, by offering this point, petitioner demonstrates his actual objective – to seek in this Court a thorough, fact-intensive, laborious review of all the evidence in the case so the Court can render an intensively fact-specific judgment that, petitioner hopes, will differ from those of the courts below. This task is fundamentally at odds with the purpose of certiorari review and will benefit none but the parties to this case.

STATEMENT OF THE CASE

Petitioner, a former City Code Inspector, turns a steady progression of the City's increasingly severe employment decisions, in the face of his unabated refusal simply to conform his property to the very municipal

[1] *See West v. Gibson*, 527 U.S. 212, 213, 119 S.Ct. 1906, 144 L.Ed.2d 196 (1999); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States*, 510 U.S. 27, 31, 114 S.Ct. 425, 126 L.Ed.2d 396 (1993).

nuisance and zoning ordinances he enforced, into a conspiracy to terminate his employment, prosecute him maliciously, deny him a right to confront witnesses, and invade his privacy interest in property he owned or possessed. Nothing about the City's initiation of prosecutions, which were continued by an independent prosecutor, or the employment decisions, which were preceded by the notice and opportunity for hearing constitutionally required, confirms such a conspiracy or any consequent constitutional violations. The simple facts are that the prosecutions were initially effectuated by summonses and marked throughout by procedures fully in compliance with the commands of the Constitution; petitioner did not present the evidence of bias he alleges and, by failing to pursue his full appellate rights, waived any procedural due process violation; petitioner presented no evidence of ownership or possessory rights in the real property searched sufficient to grant him Fourth Amendment standing; and nothing but mere temporal proximity of assertion of a constitutional right to adverse employment action in the face of a cascade of wrongdoing and initiatives to induce rectification substantiates a claim for retaliation for exercising confrontation clause rights. Specifically, acting consistently with their dual authority as petitioner's supervisors and as enforcers of municipal ordinances regulating nuisances and zoning, defendant City officials, who possessed personal and secondary knowledge that petitioner might persistently be violating the very laws he was charged with implementing, initiated investigative procedures that culminated in employment disciplinary proceedings and ordinance violation charges against petitioner. The undisputed facts reveal

that, in the employment proceedings, the City and City officials implemented progressively greater sanctions, all accompanied by specific notice of City concerns and opportunity for review, designed to induce petitioner to remedy the violations they deemed, at the very least, unbecoming of a City official and, at the most, illegal. In the municipal ordinance proceedings, which did not even commence until several months following the initial investigation of potential violations, the undisputed facts indicate petitioner received numerous hearings, a municipal trial, and a trial *de novo* before a jury, and no evidence indicates any improper City influence or action. Thus, scrutiny of the facts reveals the courts below properly decided the law.

STATEMENT OF FACTS

Petitioner, John Grimes, was a Code Inspector for the City of Independence. In December 1997, the City received complaints that one or more properties petitioner owned within City limits were marked by trash, old trucks, unlicensed vehicles, barricades, cones, and other City property. From the City's initial inspections of the property, through which some of respondent City officials discovered bricks, boards, pipes, buckets, street signs, tree debris, firewood, and a metal container, ensued neither a summons for municipal law violation nor a formal disciplinary action but merely by a request to clean the property. Petitioner agreed, but failed, to comply.

On March 16, 1998, City officials re-surveyed one of the properties and found considerable debris, including screens, buckets, boards, concrete blocks, barrels, tubes, and automobile ramps. Also on that date, petitioner apparently discovered a solution to his difficulties – deeding away the properties to his mother under her maiden name for one dollar each, transactions filed with the Recorder of Deeds on April 6, 1998. The City secured a warrant to search some of these properties during this interval. When the City searched one or more of the properties again in early April, including properties for which they did not have a warrant, petitioner no longer owned them. Petitioner may still have maintained a possessory interest in some of the personal property present on the real property, but that property was not searched.

By letter dated March 19, 1998, over three months after the initial complaint, the City took its first employment disciplinary action against petitioner, implementing its least severe sanction, a written reprimand. The letter, written more than two months prior to termination of employment, referenced the impact on petitioner's credibility as a code inspector of his "inappropriate" maintenance of his property. "Practices such as these undermine your ability to perform your duties effectively and infers [sic] a double standard in enforcement of nuisance codes." The letter related petitioner's recalcitrance in the face of knowledge of violations that was "counter-productive to our program and must not continue." "Actions such as yours can extend so far as to seriously undermine our ability to effectively execute our program." The letter specifically notified petitioner of his right to appeal and

warned that further inattentiveness would lead to more serious disciplinary action, including, possibly, termination.

Petitioner filed a grievance on April 2, and, on April 8, by letter referencing continuing intractability and its deleterious effect on the code enforcement program, the City took its second progressive employment action, removing petitioner from field work pending internal administrative review. On April 10, petitioner filed a second grievance to which respondent Tom Robillard promptly responded, specifically addressing each complaint and advising petitioner of his right to appeal. On April 10, the City also issued to petitioner summonses for each of the properties owned, charging five nuisance and zoning ordinance violations.

When the situation did not abate, Robillard notified petitioner on May 4, 1998, three business days after an arraignment at which petitioner declined a plea offer, that the City was suspending petitioner without pay. Robillard again described the problems with considerable particularity and concluded with an advisory that the City was contemplating "serious disciplinary action," including, specifically, dismissal.

After hearing and continued recalcitrance, the City, by letter dated May 27, discharged petitioner. Once again, the City related its reasons with specificity. The City advised petitioner of his right to appeal to the Personnel Board.

The Board conducted a timely hearing but failed to reach a consensus regarding the appropriate disciplinary action. By letter dated July 10, 1998, City Manager Sterett

Schanze upheld the termination and advised petitioner of his right to arbitrate the grievance. Through counsel, petitioner filed a request for arbitration but, on January 12, 1999, voluntarily withdrew the request.

The City dismissed two of the charges on legal, not factual, grounds. Petitioner subsequently was tried for the remaining three ordinance violations and, upon due evidence, convicted of all charges. As was his right, petitioner requested trial *de novo*. On the day of trial, the City dismissed one charge. The jury found petitioner guilty on one charge and not guilty on the other. The trial judge, determining the ordinance on which the former charge was based was unconstitutionally vague, dismissed the charge.

REASONS FOR DENYING THE WRIT

I. QUESTION PRESENTED NO. 1 DOES NOT PRESENT AN IMPORTANT UNRESOLVED ISSUE OF FEDERAL LAW ON THE EXISTENCE AND SCOPE OF A § 1983 CLAIM IN THE NATURE OF MALICIOUS PROSECUTION BECAUSE PETITIONER POINTS TO NO CONSTITUTIONAL VIOLATION THAT ACCOMPANIED THE PROSECUTIONS AND THE PROSECUTIONS WERE SUPPORTED BY PROBABLE CAUSE.

Even after *Albright v. Oliver*, "an embarrassing diversity of judicial opinion" exists on the question whether a malicious prosecution claim is cognizable under § 1983 and the parameters of any such claim.[2] Struggling with *Albright* in light of the principle that § 1983 "is not itself a source of substantive rights" but merely provides "a method for vindicating federal rights elsewhere conferred,"[3] federal circuit courts find a cognizable malicious prosecution claim in circumstances that span the constitutional spectrum. Some hold the common law elements of malicious prosecution alone suffice to state a claim under the Fourth Amendment.[4] Others find a claim in the

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[2] *Albright v. Oliver*, 510 U.S. 266, 279 n. 4, 114 S.Ct. 807, 127 L.Ed.2d 266 (1994).

[3] *Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).

[4] *See, e.g., Cervantes v. Jones*, 188 F.3d 805, 808-09 (7th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000) (holding right under Fourth Amendment to be free from malicious prosecution); *Kerr v. Lyford*, 171 F.3d 330, 339 (5th Cir. 1999); *Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1303 (5th Cir. 1995), *cert. denied*, 517 U.S. 1191 (1996) (stating, "This circuit has explicitly held that malicious prosecution, false arrest and bodily harm are

common law elements and a seizure effected upon initiation of prosecution.[5] Still others adopt a "continuing seizure" theory, finding a claim only in constraints in addition to any initial detention,[6] while others reject this

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actionable under Section 1983 because they violate the Fourth and Fourteenth Amendments."); *Cook v. Sheldon*, 41 F.3d 73, 79 (2d Cir. 1994) ("Though section 1983 provides the federal claim, we borrow the elements of the underlying malicious prosecution tort from state law"); *Strength v. Hubert*, 854 F.2d 421, 425-26 (11th Cir. 1988); *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988). *But see Pace v. City of Des Moines*, 201 F.3d 1050, 1055 (8th Cir. 1993) (stating that an action for malicious prosecution does not state a claim of constitutional injury); *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256 (1st Cir. 1996) (explaining that "a garden-variety claim of malicious prosecution garbed in the regalia of § 1983 must fail").

[5] *See, e.g., Price v. Roark*, 256 F.3d 364 (5th Cir. 2001) (finding no initial seizure without probable cause in violation of Fourth Amendment); *Darrah v. City of Oak Park*, 255 F.3d 301, 311-12 (6th Cir. 2001); *Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 889, 148 L.Ed.2d 797 (2001) (stating "there is no such thing as a '§ 1983 malicious prosecution' claim" but holding a claim in the nature of malicious prosecution could be grounded in the Fourth Amendment but not substantive due process); *Uboh v. Reno*, 141 F.3d 1000, 1002-03 (11th Cir. 1998); *Whiting v. Traylor*, 85 F.3d 581, 583-84 (11th Cir. 1996); *Brooks v. City of Winston-Salem, North Carolina*, 85 F.3d 178, 183-84 (4th Cir. 1996) (holding the plaintiff stated a § 1983 malicious prosecution claim upon allegations of initial seizure pursuant to legal process not supported by probable cause plus termination of proceedings in his favor); *Reed v. City of Chicago*, 77 F.3d 1049, 1053 (7th Cir. 1996); *Kohl v. Casson*, 5 F.3d 1141, 1145 (8th Cir. 1993).

[6] *See, e.g., Technical Ordnance, Inc. v. United States*, 244 F.3d 641, 650-51 (8th Cir. 2001) (finding a continuing seizure based on evidence of requirements to post bond, appear in Court, and answer charges); *Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001)

theory.[7] Finally, some find the claim, if prefaced not with any assertion of unconstitutional seizure but with some other constitutional violation, lies in the due process clause.[8]

While guidance from this Court might be instructive, this is not the case in which to struggle with *Albright*. The initial detentions, effected by summonses, were not Fourth Amendment "seizures." Even if they were, they were substantiated by probable cause and, thus, did not of themselves violate the Fourth Amendment. Further,

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(finding show of authority manifested by a series of orders to appear before court – "commonplace conditions of pretrial release" – not Fourth Amendment seizure); *Rohman v. New York City Transit Authority (NYCTA)*, 215 F.3d 208, 215-16 (2d Cir. 2000) (holding requirement to return to court and personal recognizance bond conditions suffice to state claim, at pleading stage, for Fourth Amendment violation); *Evans v. Ball*, 168 F.3d 856, 861 (5th Cir. 1999) (adopting the theory in the face of evidence the plaintiff was required to obtain permission before leaving the state, report regularly to pretrial services, sign a personal recognizance bond, and provide federal officers with financial and identifying information); *Gallo v. City of Philadelphia*, 161 F.3d 217, 221-25 (3d Cir. 1998) (holding restrictions on travel and compulsory court appearances constituted Fourth Amendment "seizure," acknowledging effect is to constitutionalize tort of malicious prosecution); *Murphy v. Lynn*, 118 F.3d 938, 945 (2d Cir. 1997), *cert. denied*, 523 U.S. 1115 (1998) (holding pretrial restrictions on travel and compulsory court attendance constitute a seizure); *Taylor v. Meacham*, 82 F.3d 1556, 1560-61 (10th Cir. 1996), *cert. denied*, 519 U.S. 871 (1996).

[7] *See, e.g., Singer v. Fulton County Sheriff*, 63 F.3d 110, 117 (2d Cir. 1995), *cert. denied*, 517 U.S. 1189 (1996).

[8] *Torres v. McLaughlin*, 163 F.3d 169, 173-74 (3d Cir. 1998), *cert. denied*, 528 U.S. 1079 (2000); *Riley v. Dorton*, 115 F.3d 1159, 1163 (4th Cir.), *cert. denied*, 522 U.S. 1030 (1997).

petitioner proved no conditions consequent upon prosecution that might countenance exploration of the "continuing seizure" theory. Additionally, absent any Fourth Amendment issue, any claim petitioner might have had lay in the Due Process Clause of the Fourteenth Amendment, and he did not invoke this protection. Finally, the prosecutions themselves were supported by probable cause, and, thus, petitioner cannot even satisfy the elements of a state-law malicious prosecution claim.

A. The Summonses Issued Were Not "Seizures" or Without Probable Cause.

Albright held only that a plaintiff who has alleged a criminal prosecution was initiated against him without probable cause has not stated a § 1983 claim for violation of his substantive right to due process under the Fourteenth Amendment.[9] Dicta indicating a § 1983 malicious prosecution action might lie under the Fourth Amendment[10] has propelled a number of courts to ground the

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[9] *Albright*, 510 U.S. at 274.

[10] *See, id.* at 277-79. *See generally Whiting v. Traylor*, 85 F.3d 581 (11th Cir. 1996) (raising but not addressing the theory); *Taylor v. Meacham*, 82 F.3d 1556, 1560-61 (10th Cir.), *cert. denied*, 519 U.S. 871 (1996) (raising but not addressing the theory upon evidence of detention throughout the course of the prosecution); *Reed v. City of Chicago*, 77 F.3d 1049, 1053-54 (7th Cir. 1996) (rejecting the theory); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 117 and n. 6 (2d Cir. 1995), *cert. denied*, 517 U.S. 1189 (1996) (validating the theory but finding no evidence of continuing seizure under the facts). *But see Nesmith v. Taylor*, 715 F.2d 194, 196 (5th Cir. 1983) (declining to decide whether mere summons coupled with threat of arrest could constitute a seizure).

action in that provision. However, because petitioner suffered no Fourth Amendment violation, this is not the case in which to decide the viability of a § 1983 cause of action under that Amendment.

The Fourth Amendment does not speak in terms of unreasonable "prosecutions" but proscribes only unreasonable searches and "seizures." *See Britton v. Maloney*, 196 F.3d 24, 28 (1st Cir. 1999), *cert. denied*, 530 U.S. 1204 (2000). Hence, the actionable constitutional violation must lie in a deprivation of liberty accompanying the prosecution, not in the prosecution itself. *Id.* at 29; *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998).

Petitioner simply did not suffer any liberty deprivation sufficient to constitute a seizure when he received notification of the initiation of prosecutions via summonses. As courts have held, this does not qualify as a deprivation of liberty sufficient to invoke the strictures of the Fourth Amendment. *See, e.g., Britton*, 196 F.3d at 29. Petitioner was never arrested or detained. The summonses did not in any manner restrict him of his liberty except to require him on certain occasions to appear in court.

While a mere "show of authority" can suffice to constitute a Fourth Amendment violation, *Terry v. Ohio*, 392 U.S. 1, 19 n. 16, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968), the mere threat of a *possibility* of sanctions upon failure to appear does not satisfy this requisite. A seizure is accomplished only if the detention results in the "intentional acquisition of physical control" over the subject and causes a "termination of [his] freedom of movement." *Brower v. County of Inyo*, 489 U.S. 593, 596-97, 109 S.Ct.

1378, 103 L.Ed.2d 628 (1989). The subject is not restricted in his liberty unless he "yields" to the assertion of authority over him. *See California v. Hodari D.*, 499 U.S. 621, 626, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). Finding a mere summons offended the Fourth Amendment would violate the tenets of these decisions and trivialize the Amendment. Thus, petitioner suffered no Fourth Amendment violation consequent upon the initiation of proceedings. *See Britton*, 196 F.3d at 29-30.

Further, even if the summonses qualified as seizures, petitioner makes no claim the prosecutions were initiated without probable cause. Accordingly, petitioner cannot tie his malicious prosecution claim to the Fourth Amendment. *See Price v. Roark*, 256 F.2d 364, 370 (5th Cir. 2001).

B. Petitioner Cannot State a Claim in Any Additional Restrictions upon His Liberty.

In *Albright*, the petitioner did not raise a Fourth Amendment claim. Consequently, the Court did not decide whether continuing restraints on liberty effected by a prosecution could form the basis of a malicious prosecution action cognizable under § 1983. Justice Ginsburg, concurring, seemed to suggest a theory under which conditions of prosecution could qualify as a seizure. *Albright*, 510 U.S. at 777-79 (Ginsburg, J., concurring). Circuit appellate courts have affirmed the theory.[11]

Even if the Court is willing to address the continuing restraint theory, this case does not present evidence of

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[11] *See* n. 6, *supra*.

any continuing restrictions upon petitioner's liberty. Petitioner offered no evidence of any conditions other than compulsory court appearances attendant to all prosecutions. The cases accepting this theory have required considerably more. *See* n. 6, *supra*.

Further, to recognize a constitutional tort in the form of malicious prosecution any time a claimant is initially seized or seized by virtue of conditions normally attendant to any prosecution would violate this Court's principle that § 1983 permits recovery only for constitutional harms[12] and constitutionalize a state-law tort. While the Third Circuit was not troubled by this consequence, *see Gallo v. City of Philadelphia*, 161 F.3d 217, 225 (3d Cir. 1998), it flies in the face of § 1983 jurisprudence. Any § 1983 action in the nature of malicious prosecution must require something in addition to the ever-attendant seizures consequent upon any and all prosecutions.

C. Petitioner Cannot Prove the Elements of State-Law Malicious Prosecution.

Under Missouri law, a claim of malicious prosecution requires proof of the following six elements: (1) commencement of an earlier action against the plaintiff; (2) instigation of the action by the defendant; (3) termination of the action in the plaintiff's favor; (4) lack of probable

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[12] *See Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305-06, 106 S.Ct. 2537, 2542, 91 L.Ed.2d 249 (1986); *Carey v. Piphus*, 435 U.S. 247, 253, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978).

cause for instituting the action; (5) malice by the defendant in instituting the action; and (6) damages.[13] Petitioner cannot prove the fourth element because the prosecutions did not lack probable cause. Following dismissal of two charges and appropriate preliminary proceedings, the municipal court found petitioner guilty of three of the charges. Petitioner appealed to the circuit court, and a jury found him guilty of one of the charges. The judge, however, found the ordinance unconstitutionally vague and, accordingly, entered a judgment of acquittal.

Petitioner may ultimately have been acquitted, but acquittal is not coterminous with lack of probable cause. Independent arbiters found petitioner guilty of one charge not once but twice and once found him guilty of another. The prosecutions terminated in petitioner's favor only because, after extensive proceedings, a judge determined one of the ordinances was unconstitutionally vague.

Missouri defines "probable cause" as reasonable belief in the facts alleged and reasonable belief that under the facts the claim may be valid under the applicable law.[14] Under Missouri law, mere dismissals do not as a matter of law prove absence of probable cause, and a

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[13] *Burnett v. Griffith*, 769 S.W.2d 780, 784 n. 2 (Mo. banc 1989); *Holley v. Caulfield*, 49 S.W.3d 747, 750-51 (Mo.App. E.D. 2001); *Jacobs v. Bonser*, 46 S.W.3d 41, 49 (Mo.App. E.D. 2001).

[14] *State ex rel. Police Retirement System of St. Louis v. Mummert*, 875 S.W.2d 553, 555 (Mo. banc 1994); *Haswell v. Liberty Mutual Ins. Co.*, 557 S.W.2d 628, 663 (Mo. banc 1977); *Holley*, 49 S.W.3d at 751.

prosecution initiated and continued in good faith that ultimately terminated because the judge found the law unconstitutionally vague does not rise to the level of lack of probable cause. Thus, under whatever circumstances this Court might recognize a § 1983 claim for malicious prosecution, petitioner as a matter of law cannot prove that claim.

D. Petitioner's Claim, If Any, Lies in the Due Process Clause.

While Justice Rehnquist, writing for the plurality in *Albright*, stated that, "In view of our disposition of this case, it is evident that substantive due process may not furnish the constitutional peg on which to hang" a § 1983 malicious prosecution claim,[15] the plurality faced only a claim characterized by an arrest without probable cause. Thus, the plurality held only that claims governed by explicit constitutional text may not be grounded in substantive due process.

Justice Souter, concurring, left open the possibility of a substantive due process claim in the nature of malicious prosecution under some circumstances. *Id.* at 289-91. Justice Souter theorized that a claim of unlawful seizure arises under the Fourth Amendment, but a claim of baseless prosecution might arise under the Due Process Clause of the Fourteenth Amendment. Other courts have affirmed this theory. *See, e.g., Torres v. McLaughlin*, 163 F.3d 169, 173-74 (3d Cir. 1998), *cert. denied*, 528 U.S. 1079

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[15] *Albright*, 510 U.S. 811 n. 4.

(2000); *Riley v. Dorton*, 115 F.3d 1159, 1163 (4th Cir. 1997), *cert. denied*, 522 U.S. 1030 (1997).

However, just as any claim *Albright* might have stated under the Fourth Amendment was not presented for review, petitioner has not preserved a due process claim. At no time did petitioner raise the spectrum of a due process violation. Accordingly, this case does not present for the Court an opportunity to flesh out the parameters of a due process malicious prosecution claim.

II. QUESTION PRESENTED NO. 2 DOES NOT PRESENT AN IMPORTANT UNRESOLVED ISSUE OF FEDERAL LAW ON DUE PROCESS ISSUES RAISED WHEN A FINAL DECISIONMAKER IS INVOLVED IN EARLIER ADVERSE EMPLOYMENT DECISIONS BECAUSE THE INVOLVEMENT OF THE DECISIONMAKER WHOSE DECISION PETITIONER CHALLENGES WAS LIMITED TO KEEPING APPRISED OF THE PROGRESS OF THE DISCIPLINARY PROBLEM CONSISTENT WITH HIS ROLE AS CITY MANAGER AND THE DECISION WAS NOT FINAL BUT SUBJECT TO AN ARBITRATION IN WHICH PETITIONER DECLINED TO PARTICIPATE.

Petitioner's exploration of his second Question Presented contains a plethora of factual misstatements, correction of which reveals the absence of the issue he alleges is presented. Specifically, petitioner complains due process was violated when the purported final decisionmaker, a City Manager, was significantly involved in both the adverse employment actions and roughly contemporaneous prosecutions for ordinance violations and, thus, was biased.

Rather than immerse the Court in a morass of *seriatim* corrections to petitioner's factual misstatements, respondents provide the accurate facts. Respondent Sterett Schanze, City Manager of the City of St. Joseph, was not the final decisionmaker. Rather, petitioner was offered written notice of his opportunity to arbitrate Schanze's decision to terminate his employment. Initially, petitioner demanded arbitration but later withdrew his request, thereby voluntarily waiving his right to a hearing before an arbitrator.

Secondly, when he made the termination decision, Schanze had before him a significant paper trail that included petitioner's views as stated in the grievances petitioner filed and the City's responses. Thus, nothing indicates Schanze did not review both sides of the dispute.

Thirdly, Schanze made no statements to the press. Thus, the presence of newspaper articles does not suffice to show bias.

Fourthly, Schanze's involvement prior to his termination decision was limited to briefings on the progress of the dispute. He did not make, direct, or affirmatively participate in earlier adverse decisions but merely was briefed in the usual course of business. He did not initiate or maintain prosecutions. Thus, bias is not, from the evidence, a reasonable inference. Further, even if it were, the courts below refused to indulge in it, resolving the intensely fact-specific evidence against petitioner.

Finally, the case does not present due process issues regarding the meaningfulness of the opportunity for arbitration because petitioner waived his right to arbitrate.

Further, contrary to petitioner's assertions, an arbitration would have been final. Any subsequent City involvement was limited to securing from the City Council an appropriation for funding any monetary award.

Under the facts determined by the courts below with all reasonable inferences drawn in petitioner's favor, this case presents no issue of offending due process. The corrections simply obliterate the Question.

III. QUESTION PRESENTED NO. 3 DOES NOT PRESENT AN IMPORTANT UNRESOLVED ISSUE OF FEDERAL LAW ON THE FOURTH AMENDMENT LEGALITY OF A SEARCH OF PROPERTY PETITIONER OWNED OR ON WHICH HE STORED PERSONAL PROPERTY BECAUSE PETITIONER DID NOT OWN THE REAL PROPERTY SEARCHED AND, THUS, POSSESSES NO STANDING TO COMPLAIN OF A FOURTH AMENDMENT VIOLATION.

Petitioner contends an issue of material fact regarding unlawful search of real property he owned or controlled precluded summary judgment. The function of the district court, rather than this Court, is to resolve disputed issues of fact. *See, e.g., Murray v. United States*, 487 U.S. 533, 543, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). This Court's office is to guide the lower courts in resolving complex issues of federal law. In any event, no issue of material fact existed because the undisputed evidence reveals petitioner relinquished all ownership interests in the real property and presented no evidence of a possessory interest in the real property evolving through an ownership interest in personal property present there.

Assuming respondents illegally searched one of the parcels of real property, petitioner cannot show the requisite reasonable expectation of privacy[16] in that property and thus has no standing to complain. In the heat of the controversy, petitioner deeded the subject real property to his mother, using her maiden name, thereby affirmatively and effectively disavowing any privacy interest. While the existence of a privacy interest may be demonstrated by evidence of the existence of such facts as a possessory interest, the taking of precautions to maintain privacy, and the existence of a right to exclude others,[17] petitioner proved none of these but, instead, denounced them. He renounced ownership, renounced exclusivity, and renounced possessory interests. Hence, he renounced privacy. A free and open society simply is not prepared to find or recognize as reasonable[18] an asserted privacy interest in property deliberately conveyed to another. *See* 1 W. LaFave & J. Israel, *Criminal Procedure*, § 3.2 at 165 (1984).

Finally, the items of personal property, in which petitioner likely did have ownership and possessory interests, were not searched. Further, he never asserted or proved by competent evidence that their continued presence on the real property vested in him a Fourth Amendment reasonable expectation of privacy in the real

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[16] *See, e.g., United States v. Dunn*, 480 U.S. 294, 316 (1987); *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

[17] *See United States v. McCaster*, 193 F.3d 930, 933 (8th Cir. 1999); *United States v. Dixon*, 58 F.3d 1258, 1264 (8th Cir. 1995), *cert. denied*, 516 U.S. 1064 (1996).

[18] *See Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

property. Clarification of factual misstatements simply reveals the total absence of any Fourth Amendment interest.

IV. QUESTION PRESENTED NO. 4 DOES NOT PRESENT AN IMPORTANT UNRESOLVED ISSUE OF FEDERAL LAW ON RETALIATION FOR EXERCISE OF A RIGHT TO CONFRONT WITNESSES BECAUSE THE TOTALITY OF PETITIONER'S EVIDENCE CONSISTS OF MERE TEMPORAL PROXIMITY OF THE EVENTS, AND THE COURT HAS DECIDED THE LEGAL ISSUE, LEAVING THE FACTUAL ISSUE TO THE COURTS BELOW.

Initially, the Question, as phrased, presents the question of prescriptive consideration of an issue the courts below did in fact consider. *See* Petition for Writ of Certiorari Appendices A, C. Further, petitioner urges this Court essentially to determine an issue of causation – when temporal proximity of adverse employment decisions to the exercise of the constitutional right to confront witness constitutes constitutionally proscribed retaliation. The Court has issued law concerning retaliation in the context of the First Amendment,[19] and nothing indicates that authority would not apply to the instant circumstances. In fact, the Court just last term determined in the First Amendment context the very legal issue petitioner

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[19] U.S. Const. amend. I. *See, e.g., Clark County School Dist. v. Breeden*, 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001); *Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996); *Sheet Metal Workers' Intern. Ass'n v. Lynn*, 488 U.S. 347, 109 S.Ct. 639, 102 L.Ed.2d 700 (1989).

raises. Thus, this case does not present an important issue meriting review.

In *Clark County School Dist. v. Breeden*, 532 U.S. 268, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001), the Court addressed a claim that the mere temporal proximity of filing a charge with the Equal Employment Opportunity Commission to an employment transfer provided the requisite causation to prove actionable retaliation. The Court disagreed, noting federal courts typically require the temporal proximity be "very close." *Id.* at ___, 121 S.Ct. at 1511 (citing cases). Thus, this Court has provided guidance to the lower courts. The Court leaves to the lower courts the often arduous task of parsing through intensive facts to flesh out the parameters of "very close."[20]

Additionally, this is not the case in which to resolve any issue of violation of a Sixth Amendment right upon evidence of temporal proximity. Petitioner presented no evidence of retaliation outside the mere temporal proximity of the actions while respondents presented significant evidence of cause for their action. Specifically, the adverse employment action of which petitioner complains, suspension from employment, was merely part of an inexorable flow of progressively severe sanctions, all documented with specificity and accompanied by the requisite due process. The City introduced a plethora of evidence indicating the cause of the suspension was not

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[20] *See, e.g., Sprenger v. Federal Home Loan Bank of Des Moines*, 253 F.3d 1106 (8th Cir. 2001); *Sowell v. Alumina Ceramics, Inc.*, 251 F.3d 678 (8th Cir. 2001); *Bell v. Runyon*, 242 F.3d 373 (Table) (8th Cir. 2000).

the exercise of a constitutional right but petitioner's continued refusal to take the actions requested and the impact of this refusal on the City.

Under these facts, the district court found "absolutely no evidence" of retaliation. Through this Question, petitioner asks that the Court revisit this finding. The office of this Court does not consist of engaging in the scrutiny of a minutiae of factual detail that consideration would require. Further, such scrutiny would benefit none but the parties to this case. Accordingly, this is not the case in which to consider the issue of retaliation for exercise of a Sixth Amendment right.

CONCLUSION

For the reasons above stated, respondents request the Court deny the petition for writ of certiorari.

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